

Judge Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

THOMAS G. TURNER,

Defendant.

NO. CR 05-355 JCC

UNITED STATES' RESPONSE IN
OPPOSITION TO DEFENDANT'S
MOTION TO COMPEL DISCOVERY
REGARDING EXPERT WITNESSES

Defendant Turner moved the court to compel the United States to provide expert witness discovery pursuant to Federal Rule of Criminal Procedure 16(a)(1)(G). The United States is fully aware of its expert witness discovery obligations and intends to fully comply with those obligations. However, at this time, the United States does not plan to offer expert witness opinion testimony in the trial of this case. The United States suggests that the defense motion to compel is not based on the government's refusal to comply with its discovery obligations, but rather on the defense's disagreement with the government's view that certain evidence does not require expert opinion testimony. In the event the United States decides to offer expert witness opinion testimony, all expert witness discovery mandated by Rule 16 will be produced to the defense no later than 45 days prior to trial. The United States requests that the court deny the motion as moot.

1 **A. The Rules Governing Expert Witness Testimony**

2 Federal Rule of Evidence 702 governs the admissibility of expert testimony at trial.

3 The Rule provides:

4 If scientific, technical, or other specialized knowledge will assist
 5 the trier of fact to understand the evidence or to determine a fact in
 6 issue, a witness qualified as an expert by knowledge, skill, experience,
 7 training, or education, may testify thereto in the form of an opinion or
 8 otherwise, if (1) the testimony is based upon sufficient facts or data,
 (2) the testimony is the product of reliable principles and methods, and
 (3) the witness has applied the principles and methods reliably to the
 facts of the case.

9 Federal Rule of Criminal Procedure 16(a)(1)(G) governs expert witness discovery:

10 “At the defendant’s request, the government must give to the defendant a written
 11 summary of any testimony that the government intends to use under Rules 702, 703, or
 12 705 of the Federal Rules of Evidence during its case-in-chief at trial. . . . The summary
 13 provided under this subparagraph must describe the witness’s opinions, the bases and
 14 reasons for those opinions, and the witness’s qualifications.” The United States fully
 15 intends to comply with this rule if the decision is made to offer expert opinion testimony
 16 at trial in the government’s case-in-chief.

17 **B. Ernst & Young Witnesses**

18 Defendant Turner appears to be basing his request for expert witness discovery on
 19 the assumption that certain Ernst & Young accountants will testify in the instant criminal
 20 case as they testified in their SEC civil investigatory depositions, such as offering various
 21 opinions on Generally Accepted Accounting Principles (GAAP). See Motion to Compel
 22 at 4-5, 7. That is not an accurate assumption. The issues in dispute in the SEC case are
 23 much broader than the issues involved in this criminal case. Moreover, the SEC
 24 investigatory depositions in particular are just that – investigatory – and thus consist of
 25 testimony significantly beyond what those witnesses may testify to in this criminal case.

26 First and foremost, the Ernst & Young accountants will be fact witnesses in the
 27 case at bar. They will testify to the questions they asked Turner, the answers he gave, and
 28 the answers he did not give, in response to their questions. See Indictment at paragraphs
 16, 19, 22, 25, 28, 31, and 34; United States Response in Opposition to Defendant’s

1 Motion to Dismiss Counts 2, 5, 6 and 7 of the Indictment, at Section A. None of that fact
2 testimony requires expert opinions.

3 Second, the Ernst & Young accountants will testify as to why their questions, and
4 Turner's answers and omissions, were important to the audit work they were performing.
5 Such testimony helps establish materiality, an element of the charged crimes. See, e.g.,
6 Ninth Circuit Criminal Pattern Instruction 9.7 Securities Fraud ("First, the defendant . . .
7 made an untrue statement of a material fact [and] failed to disclose a material fact which
8 resulted in making the defendant's statements misleading To defraud someone
9 means to make a statement or representation which is untrue and known to the defendant
10 to be untrue or knowingly to fail to state something which is necessary to make other
11 statements true, and *which relates to something important*") (emphasis added). The
12 accountants can explain why their questions and Turner's answers and omission "relate[d]
13 to something important" to their work without offering expert opinions on accounting
14 rules.

15 This case should not, and apparently will not,¹ involve a "battle of the experts"
16 over the application of Generally Accepted Accounting Principles (GAAP). The charges
17 against defendant Turner consist of materially false statements and omissions about facts
18 that Turner is alleged to have known concerning the Jeff Properties transaction, but
19 intentionally lied about and failed to disclose to Ernst & Young. As the Indictment
20 alleges, Turner understood the importance of those facts to the accountants because
21 earlier proposals for a joint venture structure had been rejected by the accountants for
22 immediate gain treatment. See, e.g., Indictment at paragraph 5 ("Based on the proposed
23 joint venture as represented by Turner . . . the accountants advised that Met would not be
24 able to record an immediate profit because the proposed joint venture failed to satisfy
25 certain accounting rules"); Indictment at paragraph 6 ("Subsequently, Turner . . .
26 telephoned Met's outside accountants several times with modified versions of the

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28 ¹ Defendant Turner has not provided the United States with any expert witness
discovery in response to the United States' several requests for such material, and
therefore, must not be planning on calling an expert witness.

1 originally proposed joint venture Each time, Met’s accountants advised that the
2 modified joint venture proposals failed to satisfy the accounting rules for recording an
3 immediate profit. Met’s outside accountants informed Turner . . . that a significant reason
4 the proposals failed to meet the requirements of the applicable accounting rules was that
5 the purchaser of Met’s property was T [Trillium] Corporation, which, in turn, was not
6 acting as an independent third-party purchaser”). To appreciate the materiality of his
7 misrepresented and withheld facts, defendant Turner need only have understood that
8 certain aspects of his joint venture proposals (and later Jeff Properties transaction
9 structure) would lead the accountants to not approve the transaction for immediate gain
10 treatment.

11 In order to convict defendant Turner, the United States does not have to prove that
12 the joint venture proposals in fact violated GAAP, or that the Jeff Properties transaction
13 in fact violated GAAP. The United States only has to prove (1) that Turner knew certain
14 facts about the true structure of the Jeff Properties transaction and lied about those facts,
15 or mislead the accountants about those facts, or failed to disclose those facts, and (2) that
16 those facts would have been important for the accountants to know. See Ninth Circuit
17 Criminal Pattern Instruction 9.7 Securities Fraud; United States v. Ebberts, 458 F.3d 110,
18 125-26 (2nd Cir. 2006) (“However, even where improper accounting is alleged, the statute
19 requires proof only of intentionally misleading statements that are material If the
20 government proves that a defendant was responsible for financial reports that
21 intentionally and materially misled investors, the statute is satisfied. The government is
22 not required in addition to prevail in a battle of expert witnesses over the application of
23 individual GAAP rules.”), Petition for Certiorari Filed, 75 USLW 3248 (Oct 26, 2006)
24 (NO. 06-590).

25 Defendant Turner asks the court to “compel discovery from these witnesses [Ernst
26 & Young accountants Behrens, Kormanik]” and “any other witness who will discuss and
27 opine on GAAP, SEC filing requirements, the accuracy and completeness of any financial
28 statement under GAAP, and their opinion of the ‘materiality’ of any omission of

information from any statement or document.” Motion to Compel at 6. Practically speaking, to grant Turner’s request would require the court to order the United States to create something which does not currently exist – “a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. . . . describ[ing] the witness’s opinions, the bases and reasons for those opinions, and the witness’s qualifications.” Fed. R. Crim. P. 16(a)(1)(G). To the extent Turner wants to know what the Ernst & Young accountants think about GAAP as applied to the facts of the Jeff Properties transaction, he already has that information through the SEC investigatory depositions, and will soon get more of it through the civil depositions of these same witnesses.

C. Conclusion

In the event the United States decides to offer expert witness opinion testimony, all expert witness discovery mandated by Rule 16 will be produced to the defense no later than 45 days prior to trial. The United States requests that the court deny the motion as moot.

DATED this 23rd day of February, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph A. Capone, hereby certify that on February 23, 2007, the foregoing pleading was filed in the United States District Court for the Western District of Washington via the Electronic Case Filing (CM/ECF) System, which will serve a copy via e-mail on opposing counsel, Suzanne Lee Elliott and David Vance Marshall.

s/ Joseph A. Capone
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